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No. 80-459

In the Supreme Court of the United States

OCTOBER TERM, 1980

W. EARL DUNCAN, ET AL., PETITIONERS

v.

GLENN PENINGER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners contend that the court of appeals erred in rejecting their claims for monetary relief against an employee of the Small Business Administration (SBA) who allegedly caused the breach of an oral agreement by the SBA to sell instruments of indebtedness.

1. Petitioners, owners of approximately 80% of the stock of Auto Vac Company, filed this suit in the United States District Court for the Western District of North Carolina against respondent, an SBA employee, seeking $300,000 in damages. In 1969, before petitioners became Auto Vac shareholders, the company borrowed $85,000 from a bank. The bank took a promissory note secured by Auto Vac's personal property. In addition, the president of the company and his wife guaranteed repayment of the loan and gave the bank deeds of trust on certain real property as additional security. SBA guaranteed 90% of the debt (Pet. App. 2a).

Two years after the initial loan transaction, Auto Vac defaulted, and the bank asked the SBA to purchase the guaranteed portion of the loan. The Auto Vac note and the various security agreements were assigned to the SBA (Pet. App. 2a).

The note matured in 1975. Since Auto Vac had failed to make full payment, the SBA began foreclosure proceedings to liquidate the security. Advancement, Inc., another Auto Vac creditor, also moved to liquidate the Auto Vac assets that had been pledged to secure its claim, and this foreclosure proceeding was coordinated with the SBA proceedings. Respondent was assigned to supervise the liquidation auction, scheduled for January 29, 1976. Shortly before the auction, petitioners offered to buy the Auto Vac notes and underlying security agreements from respondent, tendering checks in the amount of Auto Vac's debts to SBA and Advancement. Respondent refused the checks, although petitioners assert that he had orally assured them that he would accept the payment (Pet. App. 2a-3a).[1]

Petitioners sought to enjoin the foreclosure proceedings in state court. Upon removal to federal court, the action was dismissed pursuant to 15 U.S.C. 634(b)(1), which forbids any injunction against the SBA Administrator or his property. The court of appeals affirmed. *Duncan* v. *Furrow Auction Co.*, 564 F. 2d 1107 (4th Cir. 1977), cert. denied, 436 U.S. 904 (1978).

2. In January 1979, petitioners filed this lawsuit against respondent, seeking damages for harm allegedly suffered as a result of respondent's refusal to sell them the Auto Vac

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[1]Although the record is not clear, petitioners apparently assert that Advancement also had agreed to accept their payment in lieu of foreclosure (see Pet. App. 8a). Advancement is not, however, a party to this lawsuit (*id.* at 3a n.1).

notes and security agreements.[2] The district court dismissed the action "for the reasons set forth by the Fourth Circuit Court of Appeals in *Duncan, et al.* v. *Furrow Auction Co.*, 5[64] F. 2d 1107 (1977)" (Pet. App. 11a).

On appeal, the court of appeals liberally construed the complaint to allege four causes of action against respondent: (1) a violation of 15 U.S.C. 634(b)(2) because the refusal to sell to petitioners was unreasonable; (2) an improper inducement of Advancement to breach its contract with petitioners; (3) an improper taking of property in violation of the Fifth Amendment; and (4) a breach of warranty of authority (Pet. App. 4a). The court of appeals held that each of petitioners' claims for relief was barred.

Because the SBA had no contractual obligation to sell the notes and security agreements to petitioners, the court of appeals found that there was no basis for petitioners' claim that the action was "unreasonable" in violation of 15 U.S.C. 634(b)(2). Alternatively, the court found that Section 634(b)(2) does not create a private right of action for damages against an SBA employee (Pet. App. 6a-7a). As to the second claim, the court found that petitioners' "non sequitur of purely conclusory pleading" (*id.* at 8a) was insufficient to create a material issue of fact. Moreover, because petitioners "alleged no contract according them any right in the" Auto Vac property, the court concluded that they had no standing to assert any "taking" claim (*id.* at 8a-9a). Finally, as to the last cause of action, the court concluded that petitioners were charged with notice of respondent's lack of authority to bind the SBA (*id.* at 9a-10a). The court of appeals therefore affirmed the judgment of the district court.

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[2]Petitioners also filed suit against the United States in the Court of Claims, alleging the same harm (Pet. App. 4a).

3. The decision of the court of appeals is correct and does not conflict with the decision of any other court of appeals. Further consideration by this Court is unwarranted.

The court of appeals correctly held that 15 U.S.C. 634(b)(2) does not create a cause of action for damages against the SBA or its employees. The statute simply defines the broad discretionary powers of the Administrator: "the Administrator may * * * under regulations prescribed by him, assign or sell * * * *in his discretion* and upon such terms and conditions and for such consideration as the *Administrator shall determine to be reasonable*, any evidence of debt * * *" (emphasis added). A private right of action is not implied by this language. See, *e.g., Cannon* v. *University of Chicago*, 441 U.S. 677, 690-693 n.13 (1979). As this Court has observed, "[t]he ultimate question is one of congressional intent * * *." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979). See *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 23-24 (1979). There is no basis for concluding that Congress intended to create a private right of action in favor of prospective purchasers of assets held by the Administrator.

Petitioners apparently contend (Pet. 12-17) that respondent's failure to accept their checks pursuant to the asserted oral agreement violated the Fifth Amendment and that respondent should be liable in damages for his action. As the court of appeals correctly concluded (Pet. App. 6a, 8a-9a), however, petitioners never had any property interest in Auto Vac's property.[3] Hence, petitioners failed to state even a colorable constitutional claim.

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[3]Respondent, of course, had no power to make the agreement attributed to him by petitioners. See 40 Fed. Reg. 11657, 11660 (1975).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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